(2)

No. 89-1962

FILED

AUG 20 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD W. HANNON, M.D., PETITIONER

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

14 pp

QUESTION PRESENTED

Petitioner's complaint in this action alleged that he was denied procedural due process when he was terminated from his government position for failing to possess a legally valid appointment. The question presented is whether, for purposes of an assertion of qualified immunity, it was clearly established that petitioner possessed a property interest in his position that would trigger due process protections.

TABLE OF CONTENTS

	Page
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	4
Cleveland Board of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	5, 6
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	5
Kauffman v. *Puerto Rico Telephone Co.*, 841 F.2d 1169 (1st Cir. 1988)	9
Neal v. *Walters*, 750 F.2d 347 (5th Cir. 1984)	8
Office of Personnel Management v. *Richmond*, 110 S. Ct. 2465 (1990)	11
Orloff v. *Cleland*, 708 F.2d 372 (9th Cir. 1983)	10
Rosario-Torres v. *Hernandez-Colon*, 889 F.2d 314 (1st Cir. 1989)	9-10
Soni v. *Board of Trustees*, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976)	10
Vail v. *Board of Education*, 706 F.2d 1435 (7th Cir. 1983), aff'd, 466 U.S. 377 (1984)	10
Youakim v. *Miller*, 425 U.S. 231 (1976)	11

Constitution, statutes and rule:

U.S. Const. Amend. V	4
38 U.S.C. 4105(a)(1)	2
38 U.S.C. 4106(b)	7, 8
38 U.S.C. 4110	8
38 U.S.C. 4110(a)	8
Sup. Ct. R. 35.3	2

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1962

DONALD W. HANNON, M.D., PETITIONER

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The opinion of the court of appeals (Pet. App. A3-A23) is reported at 892 F.2d 653. The opinions of the district court of October 23, 1987 (Pet. App. A30-A37), and May 18, 1988 (Pet. App. A24-A29), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1990. A petition for rehearing was denied on February 13, 1990. Pet. App. A2. This Court's order extending the time for the filing of a petition for a writ of certiorari (Pet. App. 1) was issued April 27, 1990. The petition for a writ of certiorari was filed on June 13, 1990. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. 1254(1).[1]

STATEMENT

1. In 1979, petitioner was appointed staff surgeon at a VA hospital in Grand Junction, Colorado. Over the next several years, petitioner was transferred to other VA facilities, and in 1983 he was promoted to chief of surgical service at the VA hospital in Marion, Illinois. Pet. App. A4.

At the time of petitioner's original appointment, VA physicians were required by statute to "be licensed to practice medicine, surgery, or osteopathy in a State." 38 U.S.C. 4105(a)(1). The VA's regulations provided that "[l]imited licenses or any other type of license less than a full unrestricted State licensure (however denominated, e.g., temporary, limited, institutional, those obtained on the basis of being faculty members, etc.) do not meet the licensure requirement for appointment under 38 U.S.C. ch. 73." DM & S Supplement to VA Manual MP-5, pt. II, ¶ 2.04(h)(1), *reprinted in* Pet. App. A54-A55.

Petitioner did not have an unrestricted license in 1979 because the licenses he previously had obtained from California, Washington, and Minnesota had

---

[1] One of the individuals named as respondent, Edward J. Derwinski, is presently Secretary of Veterans Affairs. He was not a party to the proceedings below. Another respondent, Thomas K. Turnage, was his predecessor as Administrator of the Veterans Administration at the time of the events in suit. Since the decision of the court below involved only a claim against Turnage in his personal capacity (see p. 4, *infra*), the attempted addition of Mr. Derwinski as a party in this Court, presumably under Rule 35.3 of the Rules of this Court, is ineffective.

Respondent John Gronvall died on August 2, 1990.

been revoked, suspended, or inactivated.[2] On his application for the VA job, petitioner did not respond to a question asking whether his license to practice had ever been revoked or suspended, despite the fact that the form required a certification that all answers were true and complete to the best of the applicant's knowledge and belief. Pet. App. A4.

As a result of a nationwide audit of the licensure status of doctors it employed, the VA discovered in 1986 that petitioner had not had an unrestricted license when he was initially appointed in 1979. Pursuant to advice given by the agency's general counsel, the VA concluded that its own regulations required petitioner's immediate discharge because he had not met the qualifications for his position at the time of his appointment. See DM & S Supplement to VA Manual MP-5, pt. II, ¶ 9.09(b).[3] On June 23, 1986,

---

[2] In 1986, petitioner regained an unrestricted license from Minnesota. Pet. App. A4.

[3] Paragraph 9.09(b) provides in relevant part that:

> Any time it is found that a physician * * * fails to meet the statutory requirements for appointment, immediate action will be taken by the field station head to separate employees occupying decentralized positions. The complete circumstances regarding employees occupying centralized positions will immediately be reported to the Chief Medical Director for action. Employees occupying decentralized positions will be informed that they may request review of the separation action immediately upon receipt of the notice of proposed action. If there is some doubt as to the legality of an appointment or if review is requested, the complete record of the case along with any statement or evidence the employee desires to submit will be forwarded by the most expeditious means to the [Chief] Medical Director for decision. The field station head may defer separation of the employee while decision of the

petitioner's supervisor informed him that his position was terminated effective that day. Petitioner did not receive prior written notice of the personnel action, written reasons for the action, or a hearing with respect to the facts that occasioned it. Pet. App. A4-A5.

2. In March 1987, petitioner filed this suit seeking monetary and injunctive relief against the United States, the VA, and respondents John Gronvall (Chief Medical Director of the VA) and Thomas K. Turnage (Administrator of the VA), alleging that he had been deprived of property and liberty interests without due process in violation of the Fifth Amendment. (The action for monetary relief against Gronvall and Turnage was based on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and was thus brought against them in their personal capacity.) The district court denied a motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction (Pet. App. A30-A37), but dismissed the action as to the United States and the VA on grounds of sovereign immunity. Pet. App. A35-A37. Gronvall and Turnage then moved for summary judgment on the *Bivens* claim, on grounds of qualified immunity. The district court denied the motion, holding that it was clearly established at the time of petitioner's discharge that he had a property interest in his position. Pet. App. A27-A29.

3. The court of appeals reversed. Pet. App. A3-A23. The court noted (Pet. App. A6-A7) that government officials are entitled to immunity from suit

---

reviewing official is pending. However, if the field station head is convinced that the appointment of the employee in question violates the statutory requirements for appointment he will approve immediate separation.

for the performance of discretionary functions unless their conduct violates clearly established constitutional rights. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Applying that standard, the court held (Pet. App. A7-A15) that, on the basis of undisputed facts, petitioner "has not proved the existence of any property right that the defendants might have violated, let alone proved the existence of a clearly established right." Pet. App. A7. In particular, the court relied on the fact that, at the time of his appointment, petitioner did not have the qualifications required by law for the position to which he was appointed. Pet. App. A8-A9. Moreover, pertinent statutes and regulations put him on notice that he could not reasonably rely on any expectations he may have developed that his appointment would continue. Pet. App. A9. With respect to petitioner's claim that "an entitlement to his position arose through mutually explicit understandings between him and his superiors" (Pet. App. A12), the court held that "[t]he VA had no authority to hire [petitioner], and thus he could not legitimately rely on any assurances of continued employment." *Ibid.* The fact that the VA lacked authority to hire him provided a "crucial" (Pet. App. A13) distinction between this case and *Cleveland Board of Educ.* v. *Loudermill*, 470 U.S. 532 (1985), where one of the plaintiffs, who apparently held a valid appointment, was fired for falsifying a job application. Pet. App. A12-A13.[4]

---

[4] The court also (Pet. App. A15-A17) rejected petitioner's contention that he had been deprived of a liberty interest without due process of law. Petitioner does not renew this contention here.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The decision of the court of appeals is consistent with this Court's decision in *Cleveland Board of Educ.* v. *Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, one of the plaintiffs was summarily dismissed when his employer, a local governmental body, discovered that he had falsely stated on his job application that he had never been convicted of a felony. 470 U.S. at 535. The Court held that the plaintiff was not deprived of a "legitimate claim of entitlement"—one that would trigger due process protections—because he had obtained his job after lying on the job application. 470 U.S. at 539 n.5. The Court explained that the State could not "escape its constitutional obligations by rephrasing the basis for termination as a reason why [the plaintiff] should not have been hired in the first place." *Ibid.*

In this case, the VA did not terminate petitioner because he lied on his job application, nor has the VA attempted to "escape" any constitutional obligations by "rephrasing" the basis for his termination. Whereas the Cleveland school board would apparently have had authority to hire Loudermill had it known the truth concerning his criminal record, the legal requirements in force at the time of petitioner's appointment to the VA's Department of Medicine and Surgery precluded hiring any person who did not have an unrestricted medical license. Therefore, unlike *Loudermill*, where the State claimed that the responsible officials *should* not have hired the em-

ployee in light of his false job application, in this case the VA *could* not have hired petitioner because he did not posesss the necessary qualifications.[5]

This distinction is a significant one. Not only does it bear on the question of whether petitioner had a protected interest, see point 2, *infra*; it also bears on the question whether a hearing would have served any purpose when, as here, petitioner does not challenge the existence of the facts that disqualified him under the applicable regulations at the time he was hired.

2. a. None of the sources of entitlement on which petitioner relies provided him with a legally protectible property interest in his continued employment. As the court of appeals held, the mere fact that he was hired could not create such a property interest, because the statutes and regulations concerning qualifications for his position at the time he was hired—and throughout the period he was employed—put him on notice that his appointment was invalid. See Pet. App. A8.

b. Neither of the statutes on which petitioner relies alters this conclusion. Under 38 U.S.C. 4106(b), VA physicians are appointed "for a probationary period of two years." During that time, their performance is reviewed periodically, and the statute requires that they "shall be separated from the service" if they are found to be "not fully qualified and satisfactory." *Ibid.* As the court of appeals observed (Pet. App. A10), this provision only applies to per-

---

[5] Petitioner suggests (Pet. 13) that the VA terminated his employment because he falsified his application, not because he lacked the required qualifications for appointment. The court of appeals squarely rejected this factual contention. Pet. App. A13 n.6.

sons who have received a legal appointment and governs terminations based on job performance.[6]

Nor does 38 U.S.C. 4110, the other statute upon which petitioner relies, create a legitimate expectation of continued employment for persons not appointed in compliance with statutory requirements. In pertinent part, the statute provides that the VA's Chief Medical Director shall appoint boards to determine on fair notice and hearing "charges of inaptitude, inefficiency, or misconduct" of persons employed by the VA's Department of Medicine and Surgery. 38 U.S.C. 4110(a). As the court of appeals recognized, the predicate for application of this provision was absent in this case; the VA did not fire petitioner "because of inaptitude, inefficiency, or misconduct, but because his VA appointment was void." Pet. App. A11.[7]

c. The court of appeals properly rejected petitioner's claim (Pet. 15-18) that the facts demonstrated a mutually explicit understanding of continued employment. Petitioner relies primarily on his assertion (Pet. 3 n.1) that he informed the VA at the

---

[6] As the VA's regulations explain, employment review under 38 U.S.C. 4106(b) during the probationary period protects the agency from retaining an employee who is unsuited for permanent employment "in spite of having met legal and regulatory requirements for appointment." DM & S Supplement to VA Manual, MP-5 pt. II, ¶ 4.03, *reprinted in* Resp. C.A. Br. A6.

[7] In *Neal* v. *Walters*, 750 F.2d 347 (5th Cir. 1984), the court of appeals held that 38 U.S.C. 4110 applied to "disciplinary action" initiated when VA medical center officials are "dissatisfied with [the] performance" of a physician. 750 F.2d at 350. Because the personnel action here was neither disciplinary nor related to petitioner's job performance, *Neal* is inapposite.

time of his initial appointment that he did not have an unrestricted license from any state. According to petitioner, when the VA appointed him despite that knowledge, it thereby endowed him with a property interest in his job.

It is undisputed that petitioner did not disclose on his application that his licenses to practice medicine at the time of his employment were restricted. In light of this fact, the clear command of applicable statute and regulations precluded any agency employee from giving petitioner a legally valid assurance of continued employment.[8]

Contrary to petitioner's assertion (Pet. 16-17), there is no division among the circuits concerning whether an individual appointed to a position for which he is not legally qualified has a property interest in his continuing employment that triggers procedural due process analysis. The only other court to address the issue reached the same conclusion as the Seventh Circuit, holding that an individual appointed to a government position to which he cannot be validly appointed does not possess a "property right" in that office for purposes of procedural due process analysis. See *Kauffman* v. *Puerto Rico Telephone Co.*, 841 F.2d 1169, 1174-1175 (1st Cir. 1988); see also *Rosario-Torres* v. *Hernandez-Colon*,

---

[8] Petitioner claims (Pet. 17-18) that circulars issued earlier this year by the VA (see Pet. App. A57-A62) show that the agency did possess statutory authority to hire physicians with restricted licenses. Yet the recent modifications of agency policy show, at best, that the agency could have adopted somewhat different job qualifications in 1979, when petitioner was hired. They do not alter the fact that, at the time petitioner was hired, as well as at the time he was terminated, the applicable statute, as interpreted by VA regulations, disqualified him from the position to which he was appointed.

889 F.2d 314, 319-320 (1st Cir. 1989) (en banc). The cases cited by petitioner all involved individuals who were plainly qualified to hold the positions to which they were appointed, but who nonetheless were fired despite express, though informal, assurances that their employment would continue.[9]

d. Finally, even if there were an arguable basis on the facts of this case for a finding that petitioner had a legally protectible property interest, Gronvall and Turnage retain their qualified immunity from suit because the existence of such an interest—and hence the asserted unconstitutionality of their actions —was not "clearly established." It is undisputed that petitioner's employment was summarily terminated on the basis of the explicit advice of the VA General Counsel's office. Pet. App. A5. And the First Circuit's decisions cited above suggest that that

---

[9] In *Orloff* v. *Cleland*, 708 F.2d 372 (9th Cir. 1983), the issue was whether repeated and indefinite extensions of a VA doctor's temporary appointment created a protectible property interest; there was no question that the doctor was legally qualified to hold his position. *Id.* at 377. In *Soni* v. *Board of Trustees*, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976), the court recognized that a university professor who had received explicit assurance of continued employment had a property interest in his position. Although the professor was ineligible for tenure, there was no doubt that he was eligible to hold his teaching position. Finally, in *Vail* v. *Board of Education*, 706 F.2d 1435 (7th Cir. 1983), aff'd, 466 U.S. 377 (1984), the Seventh Circuit held that a local governmental unit had violated a contractual obligation—albeit an implied one—when it refused to extend an athletic coach's appointment as it had promised. The plaintiff in *Vail*, as in the other cases cited by petitioner, plainly possessed all necessary qualifications for his position. (An intra-circuit conflict within the Seventh Circuit would not in any event warrant further review.)

advice was fully in accord with constitutional standards. An official who relies on advice of counsel that is fully consistent with the decisions of those appellate courts to reach the issue cannot be held to have violated a "'clearly established" right.

3. In an argument not advanced before in this litigation, petitioner contends (Pet. 19-21) that respondents are estopped from relying upon the statutory and regulatory requirements concerning appointment of VA physicians. While petitioner's allegations, even if true, would not warrant estoppel,[10] petitioner's failure to present his estoppel argument below makes review by this Court unwarranted. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

AUGUST 1990

---

[10] See *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2469-2470 (1990) (assuming *arguendo* that estoppel may ever apply against government, it cannot apply absent affirmative misconduct).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20071